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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-543

THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 27, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, is unofficially reported at 1973 CCH Trade Cas. ¶74,588 and is printed as Appendix A to this petition, *infra*. The opinion of the Federal Trade Commission, not yet officially reported, is unofficially reported at [1970-73 Transfer Binder] CCH Trade Reg. Rep. ¶20,112 (FTC 1972), and is printed at pages 16-72 of the Joint Appendix filed in the Court of Appeals and also filed here.

JURISDICTION

The opinion of the Court of Appeals was filed on June 27, 1973. (App. at 1a).* The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission may order a manufacturer to cease and desist from claiming that any of its products has any safety or performance characteristic unless such characteristic is "fully and completely substantiated by competent scientific tests," without regard to whether the claim is true and without regard to whether the manufacturer has another and more appropriate basis for the claim.

2. Whether the Federal Trade Commission may order that all a manufacturer's tire safety and performance claims must be substantiated by "scientific" tests, without any finding, or any record basis for a finding, that scientific tests constitute the only reasonable foundation for such claims.

STATUTE INVOLVED

The statutory provisions involved are Subsections (a)(1) and (b) of Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45(a)(1), (b). They are printed as Appendix B to this petition, *infra*, pp. 12a-13a.

STATEMENT OF THE CASE

Petitioner seeks review of the Court of Appeals' judgment affirming that provision of the Federal Trade Commission's order which prohibits Firestone from making any tire safety or performance claim unless such claim is "fully and completely substantiated by competent scientific

* "App." refers to Appendix A to this petition.

tests." (Jt. App. 70).* That provision of the order is purportedly grounded on the Commission's narrow finding that a specific Firestone tire advertisement (that its Super Sports Wide Oval tire "stops 25% quicker" than a predecessor tire) falsely and deceptively represented that Firestone:

> had established through adequate scientific tests that Firestone Super Sports Wide Oval tires would stop 25% quicker than regular tires under typical road and weather conditions. . . . (Jt. App. 16-17, 31-32).

Significantly, the complaint did not charge and complaint counsel did not attempt to establish that the "25% quicker" stopping claim itself was false, or that Firestone's supportive test data were false, or that Firestone lacked a reasonable basis for making the claim. Neither did the Commission attempt to establish that "scientific tests" constitute the only reasonable basis for tire performance claims. The Commission therefore tried the case on the narrow issue of whether Firestone's stopping tests, conducted on a wet, slippery surface, constituted adequate scientific support for the challenged advertising claim, which the Commission construed as impliedly representing that the tire would stop 25 percent quicker "under typical road and weather conditions."**

The hearing examiner found that, while "[i]t is undisputed" that Firestone's tires "would, in fact, stop 25 percent quicker than would ordinary tires on glare ice," the

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* "Jt. App." refers to the Joint Appendix in the Court of Appeals, which has been filed here.

** Firestone has consistently denied that its advertisement implied the existence of supporting scientific tests, but has maintained that, on the basis of accepted tire testing knowledge, its tests provided an adequate and reasonable basis for the 25% quicker claim, even as broadly construed by the Commission.

tests "do not show that these tires would stop a vehicle 25 percent quicker on other surfaces." (Jt. App. 84). Characterizing the issue as not the truth of the performance claim but whether that claim was supported by adequate testing, the examiner opined that "[s]ince this issue is related to the safe use of tires and since we are dealing here with the safety of human life, it would seem that the claim of stopping quicker should be described completely and accurately and should be supported factually." (Jt. App. 85). On that basis, he concluded that the advertising claim was deceptive.

The Commission likewise stated that "[t]he sole question at issue . . . is whether [Firestone's] test of the stopping capabilities of its tires made on a hazardous surface was an 'adequate scientific' test to support its generalized, unlimited 25% quicker stopping claim." (Jt. App. 20). As to that issue, the Commission concluded "that [Firestone's] test was not an adequate scientific test" and that the "stops quicker" claim was therefore deceptive. *Id.* In formulating an appropriate cease and desist order, however, the Commission went far beyond the narrow issue it had decided. The Commission proceeded to make a much broader policy determination—that *every* tire performance claim is unfair and deceptive unless substantiated by specifically designed prior scientific tests *even though the claim is true in all respects and can otherwise be substantiated.* Thus, paragraph 5 of the Commission's order directs Firestone to cease and desist from:

> Representing, directly or by implication, that any of [its] automobile tires have any safety or performance characteristic or are superior in quality or performance to other products unless each such characteristic was fully and completely substantiated by competent scientific tests. . . . (Jt. App. 70).

On appeal to the Court of Appeals for the Sixth Circuit,* Firestone argued, *inter alia*, that its stopping test constituted adequate substantiation for its performance claim and that the Commission's order was unreasonably broad and restrictive in requiring specific scientific tests as to each future safety or performance claim. Affirming the Commission's decision and granting enforcement of its order, the Court of Appeals concluded "that the Commission's finding (that Firestone's 'broad stopping claim' was 'unfair and deceptive to consumers' because it was 'without substantial scientific test data to support it') was supported by the evidence in this record and by the fair inferences which the Commission was entitled to draw therefrom." (App. 10a-11a). Rejecting Firestone's argument respecting the scope of the order, the Court granted enforcement even though the Court allowed that it was "by no means sure that the Firestone Wide Oval tire does not 'stop 25% quicker.'" (App. 10a).

REASONS FOR GRANTING THE WRIT

This case presents a novel and important issue concerning the proper legal standards to be applied by the Federal Trade Commission in requiring advertising claim substantiation and in expanding its regulatory activities and competence into a new sector within the general field of unfair and deceptive practices.

The Commission's order—mandating that tire safety and performance claims must be supported by specific "scientific" testing—cannot be squared with its almost contemporaneous decision in *Pfizer, Inc.*, [1970-1973 Transfer Binder] CCH Trade Reg. Rep. ¶20,056 (FTC 1972). There the Com-

* Firestone invoked the jurisdiction of the Court pursuant to 15 U.S.C. §45(c).

mission had challenged an advertising claim as deceptive and unfair on the ground that it was not substantiated by "adequate and well-controlled scientific studies or tests." *Id.* at p. 22,030. In dismissing the unfairness charge the Commission squarely rejected the proposition that an advertiser must have supporting scientific test data for a product claim, holding instead that an advertiser must simply have "a reasonable basis" for making the claim.* *Id.* at pp. 22,033, 22,036-38.

Applying this "reasonable basis" standard to the case before it, the Commission specifically found "that complaint counsel have failed to demonstrate that the only reasonable basis for these affirmative product claims would be adequate and well-controlled scientific studies or tests." *Id.* at p. 22,036. The Commission recognized that the determination of reasonableness requires evaluation of a number of factors:

> The question of what constitutes a reasonable basis is essentially a factual issue which will be affected by the interplay of overlapping considerations such as (1) the type and specificity of the claim made—*e.g.*, safety, efficacy, dietary, health, medical; (2) the type of product—*e.g.*, food, drug, potentially hazardous consumer product, other consumer product; (3) the possible consequences of a false claim—*e.g.*, personal injury, property damage; (4) the degree of reliance by consumers on the claims; (5) the type, and accessibility, of evidence adequate to form a reasonable basis for making the particular claims. *Id.* at p. 22,034.

On the record before it, the Commission concluded that medical literature, clinical experience, and the general

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* The Commission also dismissed the deception charge, finding that the advertisement did not imply the existence of adequate scientific tests. *Id.* at p. 22,031.

state of medical knowledge at the time the claims were made "regardless of how that knowledge is ascertained" might constitute a reasonable basis for Pfizer's claims. *Id.* at pp. 22,036-37. While finding that the record was inconclusive, the Commission concluded that "the evidence is not sufficient to prove that respondent in fact *lacked* a reasonable basis for its advertising claims" and dismissed the complaint. *Id.* at p. 22,039.

In *National Dynamics Corp.*, [1970-73 Transfer Binder] CCH Trade Reg. Rep. ¶20,278 (FTC 1973), a case decided subsequent to the Commission's decision in this case, the Commission again rejected, as "too narrow", the proposition that performance claims must be substantiated by competent scientific tests. *Id.* at p. 22,328. Rather, the Commission held that "[t]he test in this case, as in each case that comes before us on these issues, should be whether on the full record the substantiation constitutes a reasonable basis for the challenged claims." *Id.*

To support its obvious departure from the contemporaneous standards enunciated in *Pfizer,* the Commission "distinguished" the instant case on "its facts." (Jt. App. 49). But the Commission did not, and cannot, explain in any rational way how the facts here justify such a markedly different result—the application of the significantly more stringent and illogical requirement that every Firestone claim be supported by "scientific testing" irrespective of whether a reasonable basis for the claim exists. Indeed, there is absolutely no evidence to justify such a capricious disregard of the Commission's own contemporaneous precedent.

The order is apparently grounded on the Commission's "policy" determination that, where "safety" is involved, an advertiser has an affirmative duty to conduct specific kinds of tests in advance of making a claim, even if the claim is

true or can be substantiated by other, more reliable testing or data.* As the Commission stated:

> The particular claim at issue here involves a matter of human safety. It is a claim which consumers themselves cannot verify since they have neither the equipment nor the knowledge to undertake the complicated tire tests required. They must rely on the technical expertise of the manufacturer to assure the validity of its claims. Under such circumstances, it is both unfair and deceptive to consumers to make a specific advertising claim without substantial scientific test data to support it. (Jt. App. 31-32).

The premise that thus underlies the Commission's order is that tire performance claims always have some relation to safety. But this "human safety" question was not even at issue in this case, and there is simply no evidence in this record to support the Commission's conclusion that tire performance characteristics are invariably related to safety. Nor can the Commission point to any accumulated agency experience to support its premise.** Indeed, in an analogous

---

* Under the Commission's order, generalized company or industry experience, relevant technical literature, extrapolation from known data, *etc.*, cannot be relied on. Thus, the Commission has subsequently stated that "in the circumstances of [the Firestone] case, particularly since it involved a matter of human safety, adequate scientific tests provided the only basis which could reasonably support the claim." *National Dynamics Corp.*, [1970-1973 Transfer Binder] CCH Trade Reg. Rep. ¶20,278, at p. 22,327 (FTC 1973).

** The rigid order entered here stands in marked contrast to the cautiously experimental approach taken by the Commission with respect to advertising claim substantiation in general. By resolution dated June 9, 1971, and amended August 4, 1971 the Commission served notice to all advertisers of a program for deterring unsubstantiated advertising claims. "Resolution Requiring Submission of

context, a Court of Appeals has recently struck down agency action premised on the unsupported assumption that tires pose a safety hazard because "it appears to be a fair statement from the record that, except for excessive wear (bald or thin tires), tires in general . . . pose no significant safety problem." *H&H Tire Co.* v. *United States Dep't of Transp.*, 471 F.2d 350, 354 (7th Cir. 1972).

In the recent words of this Court, "the Commission has not rendered an opinion which, by the route suggested, links its findings and its conclusions." *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 248 (1972). "The opinion is barren of any attempt to rest the order on its assessment of particular . . . considerations of consumer interests. . . . Nor were any standards for doing so referred to or developed." *Id.*

In sum, the Commission has articulated no acceptable explanation for requiring Firestone to confine its advertising claims (even if true) to claims that are substantiated by a particular species of test data selected by the Commission. Such an order is arbitrary and capricious in the extreme.

Special Reports Relating to Advertising Claims and Disclosure Thereof by the Commission in Connection with a Public Investigation," 36 Fed. Reg. 12058 (FTC June 9, 1971), as amended 36 Fed. Reg. 14680 (FTC August 4, 1971). Pursuant to this program, the Commission may ask advertisers for any data that substantiate their advertising claims and may make the information thus obtained available to the public. In a number of orders issued under this resolution, the Commission has taken care to emphasize that it is neither filing complaints nor suggesting that the recipients are guilty of any deceptive practice, but that "[i]t is merely gathering information as a part of its continuing program to determine what substantiation exists to support advertising claims." (See *e.g.*, *The Gillette Co.*, 3 CCH Trade Reg. Rep. ¶20,340 (May 24, 1973)).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 25, 1973

APPENDICES



APPENDIX A

No. 72-1990

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE FIRESTONE TIRE & RUBBER COMPANY, *Petitioner*, v. FEDERAL TRADE COMMISSION, *Respondent*. Petition to Review Final Order of Federal Trade Commission. Decided and Filed June 27, 1973.

Before: PHILLIPS, *Chief Judge*, EDWARDS and PECK, *Circuit Judges*.

EDWARDS, *Circuit Judge*. Petitioner Firestone seeks review of an order of respondent Federal Trade Commission under 15 U.S.C. § 45(c) (1970). FTC had found Firestone guilty of unfair and deceptive advertising, in violation of 15 U.S.C. § 45(a) (1970), in relation to two particular advertisements. One of them may be characterized as the "Safe Tire" ad and the second ad as the "Stop 25% Quicker" ad.

I. THE "SAFE TIRE" AD

As to this series of advertisements, the parties stipulated as follows:

I. *Duration of Advertising Program*

1. Beginning on December 25, 1967, and continuing through May 18, 1968, the following text, or a text substantially similar to it, was used in certain Firestone advertisements:

> THE SAFE TIRE. FIRESTONE
>
> When you buy a Firestone tire—no matter how much or how little you pay—you get a safe tire.

Firestone tires are custom-built one by one. By skilled craftsmen. And they're personally inspected for an extra margin of safety. If these tires don't pass all of the exacting Firestone inspections, they don't get out.

Every new Firestone design goes through rugged tests of safety and strength far exceeding any driving condition you'll ever encounter. We prove them in our test lab. On our test track. And in rigorous day-to-day driving conditions. All Firestone tires meet or exceed the new Federal Government testing requirements. (They have for some time.)

Firestone—The Safe Tire. At 60,000 Firestone Safe Tire Centers. At no more cost than ordinary tires.

II. *Firestone's Design And Manufacturing Testing And Quality Control Procedures*

1. The state of tire manufacturing technology in [sic] such that use of the best manufacturing procedures and tests and quality control techniques known to the industry cannot insure that each tire produced by a manufacturer is absolutely free from any defects in materials or workmanship.

2. During the period of the advertisements set forth above, Firestone exercised due care and used its best efforts to employ the best manufacturing procedures and tests and quality control techniques known to the industry to design and manufacture tires free from defects in materials and workmanship.

As to this issue the Commission's opinion says:

We conclude that respondent's absolute representation that its tires are "safe" is false and deceptive on its own admission that tires cannot under today's technology be assured of being free of defects. In view of this technological impossibility, it is an unfair and

deceptive act and practice for respondent to make the unqualified assertion of safety which it made in this case.

Conditions of Use Claim

While it is clear from the face of the advertisement that respondent makes no *explicit* claim that its tires are safe under all conditions of use, we believe it does so implicitly. Respondent's advertisement asserts flatly that the Firestone tire is "The Safe Tire" and describes the exacting rugged tests ("far exceeding any driving conditions" consumers will ever encounter) which the tires are put through to assure this safety. Respondent's advertisement gives no indication that there is any limit to the safety of this tire or what such limits might be.

Firestone, on the other hand, emphasizes the stipulation recited above as to its employing the language, "the best manufacturing procedures and tests and quality control techniques known to the industry" and interprets the "Safe Tire" ad as "assuring average tire consumers that Firestone did everything humanly and technically possible to sell tires free of defects." Firestone also emphasizes that a large majority of persons interviewed concerning the "Safe Tire" ad thought that it meant something less than a guarantee of absolute safety.

As to this issue the Commission ordered Firestone to cease and desist from:

1. Representing, directly or by implication, that every purchaser of tires bearing the brand name "Firestone," or any other brand name, is assured of receiving tires free from defects in materials or workmanship or other manufacturing defects.

2. Misrepresenting, in any manner, the effectiveness of respondent's quality control or inspection procedures.

3. Using the words, "The Safe Tire," or any other

> dures and tests and quality control techniques known to the industry cannot insure that each tire produced by a manufacturer is absolutely free from any defects in material or workmanship.

This stipulation, in effect, concedes that defective Firestone tires can and do reach the consumer.

We deal, of course, with a statutory ban on "unfair or deceptive acts or practices." If no one were misled, we might reexamine our own conclusions vis-a-vis the Commission's inferences about this ad in considerably more detail. Here, however, Firestone's own consumer survey demonstrated that 15.3% of a scientifically selected sample of tire purchasers thought the "Safe Tire" ad meant:

> (d) "Every Firestone tire is absolutely safe no matter how it is used and regardless of the tire inflation pressure and load of the car;" or "Every single Firestone tire will be absolutely free from any defects."

We find it hard to overturn the deception findings of the Commission if the ad thus misled 15% (or 10%) of the buying public.

We find no overbreadth or deficiency in the remedial order of the Commission, and as to it we affirm and grant enforcement.

II The "Stops 25% Quicker" Ad.

The Firestone "Stops 25% Quicker" ad reads:

> ". . . Like the original Super Sports Wide Oval Tire. It came straight out of Firestone racing research.
>
> It's built lower, wider. Nearly two inches wider than regular tires. To corner better, run cooler, stop 25% quicker."

By stipulation the parties agreed that the "stop 25% quicker" portion of the ad above was employed by Fire-

stone in nationwide magazine advertising from January 16, 1967 to September 20, 1968, and omitted thereafter.

The only comparative stopping test submitted by Firestone was also stipulated by the parties as having been proved for this proceeding:

EF'—7.75-14 VS F70-14

TESTED 5-13-66
SURFACE WET SMOOTH CONCRETE

STOPPING DIST. LOAD—1120 LBS/TIRE INFL—24 PSI

SIZE

7.75-14	F-70-14
002AD363	L3126-03
002AD389	L3126-08
75 FT TO	54 FT TO
80 STOP	55 STOP
70	55
78	55
75	51
78	52
75	50
75	54
75	54
77	52
AVG. 75.8	53.2

The Commissioner's position on this issue is stated as follows:

> In sum, we find that the admitted circumstances under which respondent tested its tires were limited and that despite these limited test conditions, respondent used these tests as its sole support for its advertisement representing that its Wide Oval tires would stop 25% quicker under all road and weather conditions and

relative to all other types of regular tires. Its test did not support, either directly or by reasonable extrapolation, respondent's broad stopping claim. The particular claim at issue here involves a matter of human safety. It is a claim which consumers themselves cannot verify since they have neither the equipment nor the knowledge to undertake the complicated tire tests required. They must rely on the technical expertise of the manufacturer to assure the validity of its claims. Under such circumstances, it is both unfair and deceptive to consumers to make a specific advertising claim without substantial scientific test data to support it.

Firestone's position, on the other hand, as stated in its brief, is as follows:

> As set forth in the statement of facts, there is no dispute in the record that (1) Firestone conducted stopping tests of its Wide Oval tires prior to publishing the advertised claim, (2) Firestone's tests were adequate and well controlled scientific tests conducted according to established technological standards, (3) the wet concrete test surface was a typical wet hazardous road surface which might be encountered by motorists, (4) the tests demonstrated that on the wet concrete surface, the Wide Oval tire stopped 29.8% quicker than the regular width tire. These record facts, combined with Dr. Brenner's expert conclusion that the effect of the greater tread width would be more pronounced on dry surfaces, affirmatively demonstrate that Firestone's scientific tests adequately established the factual accuracy of the "stops 25% quicker" comparison between the Wide Oval and narrow tires.

As to this issue the Commission's order directed Firestone to cease and desist from:

> 5. Representing, directly or by implication, that any of respondent's automobile tires have any safety or performance characteristic or are superior in quality or

> performance to other products unless each such characteristic was fully and completely substantiated by competent scientific tests, with the results of the test, the original test data collected in the course of the test, and a detailed description of how the test was performed available in written form for inspection for at least three years following the final use of the representation.

On this appeal Firestone argues that 1) its ad did not impliedly assert that the "stops 25% quicker" language was based on scientific testing and that the Commission made no explicit finding to that effect; 2) that in any event, its own series of tests on wet, slippery pavement did represent adequate scientific proof of its assertion, or if not that, such proof could reasonably be extrapolated from that test, and 3) that the cease and desist order was unreasonably broad and restrictive in requiring scientific proof as to *any* safety or performance characteristic advertised.

As to the first of these issues, we believe the Commission did find that the "Stops 25% Quicker" ad implied scientific testing. It said:

> In the circumstances of *this* case, we believe that consumers could reasonably have expected Firestone's performance and safety claims to have been substantiated by scientific tests.

In addition, we think such an implication is entirely reasonable from the comparison and percentage language employed.

As to Firestone's second argument above, we note at the outset that Firestone presented no witnesses at all in this proceeding. It relied entirely upon data provided by a comparison of two tires (both Firestone products) in ten runs on the same day on the same wet, smooth concrete surface

at 15 m.p.h. with the same tire pressure and load. These ten runs showed an average stopping distance of 29.8% less for the Firestone Super Sports Wide Oval tire as compared to a Firestone Super Sports tire of standard tread width.

The Commission makes no comment derogatory to the scientific nature or the accuracy of the test upon which Firestone relies. Rather, it attacks the adequacy of one set of tests on one surface (we would be tempted to add, at one speed) to support the "stops 25% quicker" generalization. Of course, we note that the Commission's own expert witness, Dr. Brenner, seemed to concede that a tire which stopped quicker on a wet surface would, under similar conditions, as to surface, speed, etc., stop still more quickly on a dry surface. What Dr. Brenner would not concede was that testing on any one surface was adequate to represent driving conditions nationwide. As to his own testing practices, he testified:

> In our attempts to develop a test method in order to establish a standard for traction, we laid out five surfaces with different coefficients of friction and different textures, and we ran somewhere in the neighborhood of sixty-five different sets of tires through a variety of tests using skid trailers and vehicle in two maneuvers stopping distance and in spin-out on a curve. And then we ranked the tires according to their performance on each test, on each surface in each maneuver.

We are by no means sure that the Firestone Wide Oval tire does not "stop 25% quicker." But that is not our question. We have to deal with the record that has been submitted in this case. On this record we conclude that the Commission's finding (that Firestone's "broad stopping claim" was "unfair and deceptive to consumers" because it was "without substantial scientific test data to support it") was sup-

ported by the evidence in this record and by the fair inferences which the Commission was entitled to draw therefrom. Under our limited standard of review, we certainly cannot hold to the contrary. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 384-85 (1965).

As to Firestone's third argument regarding the "stops 25% quicker" ad, we find no overbreadth or violation of due process in the cease and desist order paragraph 5.

The Commission's order to cease and desist is affirmed and granted enforcement.

APPENDIX B

15 U.S.C. § 45

(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * *

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such

method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

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THE FIRESTONE TIRE & RUBBER COMPANY,
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FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

Petitioner ("Firestone") seeks review of a decision by the court of appeals affirming an order of the Federal Trade Commission. The order directs Firestone to cease and desist from making representations regarding the safety or performance characteristics of its automobile tires, unless such claims are substantiated by "competent scientific tests."

1. In 1967 and 1968 Firestone represented, in nationwide magazine advertisements, that its Super Sports Wide Oval tires "stop 25% quicker." Based on this and another advertisement disseminated by Firestone[1], the

[1] The other advertisement related to the "safety" of Firestone tires.

Federal Trade Commission issued an administrative complaint charging petitioner with false and misleading advertising in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

At the hearing, Firestone introduced the results of a single stopping-distance test to support its "stops 25% quicker" claim. This test consisted of ten comparative runs between Firestone Wide Oval tires and similar tires of standard tread width (J. App. 95-96, 115).

To place petitioner's test result in context, counsel supporting the complaint presented testimony by Dr. F. Cecil Brenner, Chief of the Tire Systems Section of the National Bureau of Standards. Dr. Brenner stated that the particular road surface used in Firestone's test was equivalent to "glare ice" and said it was not typical of road surfaces in the United States (J. App. 192-193). Moreover, Dr. Brenner indicated that the tires compared might not react in the same relative way on dry surfaces as they had on wet (J. App. 193-194).

The hearing examiner upheld the complaint. The Commission affirmed the examiner's decision. It found that Firestone's "stops 25% quicker" claim implied substantiation by scientific testing (J. App. 20, 30). It concluded that Firestone's single stopping test, conducted on one atypical surface from one speed, did not substantiate this broad claim (J. App. 20, 31). The Commission ordered Firestone to cease and desist from, *inter alia* (J. App. 70):

> 5. Representing, directly or by implication, that any of [petitioner's] automobile tires have any safety or performance characteristic or are superior in quality or performance to other products unless each such characteristic was fully

> and completely substantiated by competent scientific tests * * *.

The court of appeals unanimously affirmed the Commission's order (Pet. App. 10a-11a):

> [W]e conclude that the Commission's finding (that Firestone's "broad stopping claim" was "unfair and deceptive to consumers" because it was "without substantial scientific test data to support it") was supported by the evidence in this record * * *.
>
> As to Firestone's third argument regarding the "stops 25% quicker" ad, we find no overbreadth or violation of due process in the cease and desist order paragraph 5.

2. The decision below is correct and the petition for certiorari raises no question warranting further review.

The Federal Trade Commission has wide discretion in determining what remedy is necessary to eliminate unfair or deceptive trade practices, and "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608, 611-613.[2]

Petitioner argues that paragraph 5 of the Commission's order—requiring that tire safety and performance claims be substantiated by competent "scientific tests"— is overly broad and inconsistent with the prior decision of the Commission in *Pfizer, Inc.*, 81 F.T.C. 23.

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[2] See also: *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473-476; *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392-395; and *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-431.

In *Pfizer*, the complaint charged unfair and deceptive practices in connection with the advertising of a drug product for the treatment of minor burns and sunburn. The Commission held that "it is an unfair practice in violation of the Federal Trade Commission Act to make an affirmative product claim without a reasonable basis for making that claim" (81 F.T.C. at 62). The complaint was dismissed, however, because the issue as to the correct legal standard to be applied was not satisfactorily raised and because complaint counsel had failed to prove that the product's advertising represented that its claims had been substantiated. With respect to "[t]he question of what constitutes a reasonable basis," the Commission observed that "there may be some types of claims for some types of products for which the only reasonable basis, in fairness and in the expectations of consumers, would be a valid scientific or medical basis" (*id.* at 64).

In the present case, the Commission found that Firestone's "stops 25% quicker" advertisement was deceptive because it implied prior substantiation although petitioner had failed adequately to substantiate its claim. Based on this finding, the Commission ordered Firestone to substantiate its future tire safety and performance claims by competent scientific tests. The Commission explained that (J. App. 49-50):

> [A] scientific test is one in which persons with skill and expertise in the field conduct the test and evaluate its results in a disinterested manner using testing procedures generally accepted in the profession which best insure accurate results. This is not to say that [petitioner] always must conduct laboratory tests. The appropriate test depends on the nature of the claim made. Thus a road or user

> test may be an adequate scientific test to substantiate one performance claim, whereas a laboratory test may be the proper test to substantiate another claim. [Petitioner's] obligation is to assure that any claim it makes is adequately substantiated by the results of whatever constitutes a scientific test in those circumstances.

The Commission deemed substantiation by scientific testing necessary because (J. App. 31-32):

> The ["stops 25% quicker" claim] involves a matter of human safety. It is a claim which consumers themselves cannot verify since they have neither the equipment nor the knowledge to undertake the complicated tire tests required. They must rely on the technical expertise of the manufacturer to assure the validity of its claims. Under such circumstances, it is both unfair and deceptive to consumers to make a specific advertising claim without substantial scientific test data to supprt it.

The requirement that Firestone substantiate its tire safety and performance claims by competent scientific testing thus is reasonably related to the violations found by the Commission and consistent with the decision in *Pfizer*. The remedy is no broader than "is necessary to eliminate the unfair or deceptive trade practices which have been disclosed" (*Siegel, supra*, 327 U.S. at 612).[3]

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[3] A particular remedy is not invalid because in other cases involving a similar problem the agency has selected narrower relief. Cf. *Butz* v. *Glover Livestock Commission Co., Inc.*, 411 U.S. 182, 187.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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